IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER.....

ALFRED F. DOWD, as Warden of the Indiana State Prison,

Petitioner,

v.

UNITED STATES OF AMERICA, ex rel. Lawrence E. Cook,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REFERENCE TO OPINION OF THE COURT BELOW

The opinion of the Court Below is set forth in full at pages 203 and 209 inclusive in the Transcript of the record and has been officially reported at page 212 of 180 Fed. (2d).

JURISDICTION

This is a petition for writ of certiorari in which this Court is asked to review a decision of the Circuit Court

of Appeals for the Seventh District. The statutory authority for so doing is Title 28, U.S. Code, Section 1254 (1).

STATEMENT OF THE CASE

This brief is filed with, and as a part of, our petition for writ of certiorari, and a summarized statement of the case is on page two (2) herein.

ASSIGNED ERRORS

We believe that the Circuit Court of Appeals by affirming the decision of the Federal District Court erroneously decided the questions which we are presenting to this Court. Said questions are on pages three (3) and four (4) herein and the Court's decisions of these questions are on page five (5) herein.

ARGUMENT

THE FOLLOWING ARGUMENT IS BASED ON THE FIRST OF THE FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

The questions of fact presented, by the Respondent, to the Federal District Court, in his petition for Habeas Corpus, are the exact questions which the Respondent presented to the Indiana Supreme Court for its determination. (Record Page 117 et seq.). The Indiana Supreme Court heard the evidence by affidavits submitted by the Respondent and by the State. Without rendering a written opinion concerning these questions, the Court denied the Respondent's petition. Thereafter, the Respondent petitioned for a rehearing in which he again presented these same questions, and the Indiana Supreme Court denied the petition for rehearing. (Record Page 134 et seq.). We believe that the Supreme Court of Indiana considered and adjudicated the merits of Respondent's contentions which were fully set forth in his petition and that the Indiana Supreme Court by denying his petition determined that the allegations thereof were untrue. This constitutes a determination of questions of fact and should be res judicata. A petition for writ of certorari was filed in this Court by the Respondent, and said petition was denied. (*Cook v. Howard* 67 S.Ct. 981).

Since the Indiana Supreme Court has considered and adjudicated the merits of Respondent's contentions, and

This Court has declined to accept certorari, a Federal Court should not reexamine these questions of fact in habeas corpus proceedings.

Mart v. Loinson, 169 Fed. (2d) 116;
Sollinger v. Loisel, 265 U. S. 224;
Wade v. Mayo, 334 U. S. 672.

By assuming jurisdiction and determining the case, under the circumstances of this record, the District Court actually review the case decided by the Indiana Supreme Court, as though the Respondent had appealed. Habeas Corpus can not be made to do service for an appeal.

Burall v. Johnson, 134 Fed. (2d) 614;
Heiman v. Stoutamire, 26 Fed. Supp. 301;
39 C.J.S. "H.C.," Sec. 15 and Notes on Page 447.

THE FOLLOWING ARGUMENT IS BASED ON THE SECOND OF FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

Judge Kerner dissented from the majority opinion of the Circuit Court of Appeals and in said dissent stated as follows:

> "I can not agree that a prisoner whose guilt was established by a regular verdict and who has made no contention that the judgment convicting him guilty of murder was void, should escape punishment under the facts in this case."

The Federal District Court and the Court of Appeals relied on the case of *Cockran v. Kansas*, 316 U.S. 244 in

deciding this question. It is believed that the Cockran case is not an authority applicable to this case. This Court received the Cockran case on a direct appeal from the Supreme Court of the State of Kansas, and after exercising its power of review, remanded the case back to the Kansas Supreme Court. The instant case represents an entirely different situation. The Federal District Court is not a review Court and had no authority to remand this case back to the Indiana Supreme Court; therefore, it afforded the petitioner the extraordinary remedy of complete freedom in spite of the fact that there was no contention by anyone concerned that Respondent's conviction of murder was invalid in any respect.

THE FOLLOWING ARGUMENT IS BASED ON THE THIRD OF FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

It is believed that no Federal question was presented to the Federal District Court by the Respondent, and that the Federal District Court should have refused jurisdiction. Even assuming, but not conceding, that Prison Officials under Warden Daly prevented the Respondent from sending out appeal papers during 1931 to 1932, the Respondent was not denied equal protection of the law as claimed by him. The record in this case disclosed that the Respondent was incarcerated in 1931, and that Warden Daly's tenure as Warden expired in June 1933. Mr. Kunkel served as Warden from June 1933 to May 1938. The record further disclosed that in 1933 Warden Kunkel called a meeting which was attended by all inmates of the prison except those who were ill or insane and promulgated the

rule that any prisoner who desires to do so could send any writing to any Court or any Lawyer as a special letter at any time. (Record page 157, 158). There is no contention and no evidence whatsoever of any restriction on sending papers to Courts or to Lawyers from the time of Warden Kunkel's meeting in 1933 until the present date.

While it is true that the Respondent testified that he did not attend Warden Kunkel's meeting, he did state that he learned of the rule promulgated at said meeting. He testified, on page 85 of the record, that he learned that Mr. Kunkel permitted papers to go out. It is also to be noted that the petitioner had to be aware that he was not restricted from sending out papers, because the record shows that Cook did prepare and mail a coram nobis petition in October, 1937. (Record page 204; *Cook v. Indiana,* 219 Ind. 234, 37 N. E. (2nd) 63).

We believe that no Federal question is presented for the reason that the petitioner was not denied equal protection of the law. The right to appeal is not a constitutional right, but a statutory one. Since it is a statutory right, all are entitled to it, and to deprive anyone of it would constitute a denial of equal protection of the law. In the instant case even if Cook was prevented from 1931 to 1933 from sending out appeal papers he was not denied equal protection of the law. This is true because if he was so prevented, the time limitation for taking an appeal would not be running against him the entire time he was under this disability. However, the restriction was lifted, and Cook was no longer disabled. The time limitation for taking an appeal (at that time) was six months. This six months' period started to

run either on the day that Warden Kunkel lifted the restriction (in 1933) or it started to run when Cook first had knowledge that the restriction was lifted. When it did start to run he was entitled to a six months' period, which is the exact time allowed, to every other convicted prisoner. Whether this time started to run when Warden Kunkel lifted the restriction or when Cook first had knowledge of that fact, is immaterial. The six months' period, computed from the time Kunkel lifted the restriction, expired sometime in 1934. Cook made no attempt to appeal during that time. We do not know when Cook first became aware of the fact that the restriction was lifted and that he was no longer under disability (if he ever was) but we do know from the record in this case which has been cited herein that the petitioner sent out a petition for writ of error coram nobis in October, 1937. Therefore, he knew at that time that he was under no disability. If the time is computed from October, 1937, it would have expired in 1938, Cook made no attempt to take any appeal during that time.

If Cook was under a disability, the time for taking an appeal would begin to run on the day that said disability was removed. On that day Cook would occupy the same status as a prisoner who was convicted on that same day; viz., each would have exactly six months in which to take an appeal. It is a matter of common knowledge that most prisoners do not appeal from their convictions; when they do not appeal within the time provided for so doing they waive their right to do so.

Assuming that the State prevented Cook from taking an appeal, said prevention would not constitute a *denial* of equal protection of the law because the right was subse-

quently restored. The State of Indiana (assuming that Cook was restrained) did no more than temporarily *suspend* Cook's right to appeal. However, said right was restored to him and he was permitted a full six months' period in which to perfect an appeal, said period of time is equal to that afforded any other prisoner, and Cook by not presenting an appeal, waived his right to do so.

THE FOLLOWING ARGUMENT IS BASED ON THE FOURTH OF THE FOUR QUESTIONS PRESENTED IN OUR PETITION FOR WRIT OF CERTIORARI.

The decision of the Federal District Court and the Court of Appeals has the effect of telling the State of Indiana that it owed Cook the opportunity to perfect an appeal at the time that the case was heard by the Federal District Court, and that the failure to grant same is a denial of the equal protection clause of the Constitution. If the State is under this obligation, the petitioner would have considerably more that equal protection of the law; he would be in a position of favor. While everyone else has a time limitation for an appeal, the Respondent's time would remain unlimited.

The Respondent filed his coram nobis action in October of 1937. It was not until 1945 that he brought any legal action based on the alleged suppression of appeal papers. This was filed in the LaPorte County Indiana Circuit Court as a habeas corpus action. After a full and complete hearing, the LaPorte Circuit Court denied the Respondent's petition.

For each and all of the above reasons the petitioner believes that the decision of the Federal District Court and of the Circuit Court of Appeals was erroneous, and for each and all of the above reasons the petitioner believes that the questions presented in this case are such as should be decided by this Court.

Respectfully submitted,

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